Supreme Court, U.S.
FILED
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(6)

No. 98-1960

IN THE

Supreme Court of the United States

CORTEZ BYRD CHIPS, INC.,

Petitioner,

v.

BILL HARBERT CONSTRUCTION COMPANY,
A DIVISION OF BILL HARBERT INTERNATIONAL, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

JOINT APPENDIX

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Petition for Certiorari Filed June 7, 1999
Certiorari Granted September 10, 1999

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1.	1/20/98	Complaint to enforce arbitration award
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3.	1/21/98	Summons and complaint issued
4.	2/27/98	Answer to complaint and counterclaim by defendant against plaintiff filed
5.	2/27/98	Motion by defendant to dismiss or to transfer or to stay case
6.	2/27/98	Motion by defendant to vacate the portion of the arbitration award pertaining to the payment of damages filed
7.	3/2/98	Motion by plaintiff for leave to amend its complaint by making a substitution to paragraph 5
8.	3/2/98	Order granting motion for leave to amend complaint entered
9.	4/22/98	Answer to counterclaim filed
10.	4/24/98	Memorandum opinion filed
11.	4/24/98	Order denying motion to dismiss, to transfer or to stay case filed
12.	5/11/98	Motion by defendant for order to file interlocutory appeal filed
13.	5/18/98	Motion (renewed) by plaintiff for order to confirm arbitration award filed

14. 5/20/98 Memorandum opinion filed

15. 5/20/98 Order denying motion for order to file interlocutory appeal, granting motions for order to confirm arbitration award, denying motion to vacate the portion of the arbitration award pertaining to the payment of damages filed

16. 5/29/98 Notice of appeal by defendant filed

17. 6/1/98 Memorandum opinion filed

18. 6/1/98 Order that Final Judgment be entered in favor of plaintiff for net sum of $274,256.90 plus interest of $2,542.70 plus costs of $150.00 for a total of $276,949.60, Terminating case

19. 6/4/98 Notice (amended) of appeal by defendant

20. 6/12/98 Motion (Emergency) by defendant to stay, and for addition time to post supersedeas bond filed

21. 6/17/98 Order denying motion to stay, and for additional time to post supersedeas bond entered

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1. 6/7/99 Petition for Certiorari filed

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[Filed Jan. 20, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BILL HARBERT CONSTRUCTION COMPANY, a division of Bill Harbert International, Inc.,	)
Plaintiff,	)
	) **Civ. Action**
v.	) **No. [98CV117]**
CORTEZ BYRD CHIPS, INC.,	)
Defendant.	)

COMPLAINT TO ENFORCE ARBITRATION AWARD

Parties

1. Plaintiff, Bill Harbert Construction Company ("Harbert"), an unincorporated division of Bill Harbert International, Inc., an Alabama corporation, is in the business of commercial construction. Harbert's principal place of business is in Birmingham, Alabama.

2. Defendant, Cortez Byrd Chips, Inc. ("Cortez Byrd"), a Mississippi corporation, is in the business of debarking and chipping logs for the paper products industry. Cortez Byrd's principal place of business is in Brookhaven, Mississippi.

Jurisdiction

3. Jurisdiction exists in this Court by virtue of diversity of citizenship, 28 U.S.C. § 1332. The amount in controversy exceeds Seventy Five Thousand Dollars ($75,000.00), exclusive of interest and costs.

4. As demonstrated below, jurisdiction also exists in this Court by virtue of the Federal Arbitration Act, 9 U.S.C. § 9.

Facts and Procedural Background

5. On October 16, 1995, a predecessor in interest to Harbert entered into a contract with Cortez Byrd to erect a prefabricated chip mill in Brookhaven, Mississippi.

6. Article 10.8 of the contract provides:

> All claims or disputes between the Contractor and the Owner arising out [of] or relating to the Contract, or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect. . . . Notice of the demand for arbitration shall be filed in writing with the other party to this Agreement and with the American Arbitration Association and shall be made within a reasonable time after the dispute has arisen. The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

7. After Harbert completed the project in or about October 1996, it engaged in a series of discussions with Cortez Byrd, regarding excess expenditures, labor, and overhead incurred by Harbert as a result of actions by Cortez Byrd and Cortez Byrd's designer and fabricator.

8. Harbert was unable to resolve its dispute with Cortez Byrd and, on April 30, 1997, filed a demand for arbitration in writing with Cortez Byrd and the Atlanta, Georgia office of the American Arbitration Association.

9. An arbitration panel was thereafter selected, who on Tuesday, November 18, 1997, through Friday, November 21, 1997, conducted an arbitration proceeding in Birmingham,

Alabama. Sworn testimony and evidence were presented to the arbitration panel by both parties.

10. On December 10, 1997, the arbitration panel made an award in favor of Harbert and against Cortez Byrd, adjusting the base contract amount owed Harbert upward from $1,357,000.00 to $1,845,000.00. The arbitrators also ordered Cortez Byrd to pay Harbert $2,500.00 as reimbursement to Harbert of Cortez Byrd's share of the arbitrators' fees and expenses that were previously advanced to the American Arbitration Association by Harbert. A true and correct copy of the arbitration panel's award is attached hereto as Exhibit A.

11. Pursuant to the award, Cortez Byrd is required to pay the sums owed Harbert within 60 days of the award date. Thereafter, interest is to accrue at the rate of ten percent per annum.

12. Prior to the arbitration, Cortez Byrd had paid to Harbert $1,573,243.10.

WHEREFORE, Harbert requests the Court to enter an order confirming the arbitration panel's award and to enter judgment thereon in favor of Harbert and against Cortez Byrd for the net sum of $274,256.90 ($1,845,000.00 adjusted contract amount plus $2,500.00 reimbursement less $1,573,243.10 payment), plus interest, costs, expenses, and other and further relief the Court deems just and proper.

/s/ Edward P. Meyerson
EDWARD P. MEYERSON
114309504

/s/ Frederick M. Thurman
FREDERICK M. THURMAN
256963110
Attorneys for Plaintiff

Exhibit A

AMERICAN ARBITRATION ASSOCIATION
ARBITRATION TRIBUNAL

In the Matter of the Arbitration Between:

Bill Harbert Construction Company, a division of Bill Harbert International, Inc. ("Harbert")
and
Cortez Byrd Chips, Inc. ("Byrd")

CASE NUMBER: 30 110 00164 97

AWARD OF ARBITRATORS
December 19, 1999

(Exhibit A printed in full at pages 62 to 63 of this Joint Appendix)

[Filed Feb. 27, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BILL HARBERT CONSTRUCTION COMPANY, a division of Bill Harbert International, Inc.,	)	
Plaintiff,	)	
	)	**Action No.**
v.	)	**98G117S**
	)	
CORTEZ BYRD CHIPS, INC.,	)	
Defendant.	)	

ANSWERS, DEFENSES AND COUNTERCLAIM

COMES NOW the Defendant, Cortez Byrd Chips, Inc. ("Byrd"), and files this its Answer, Defenses and Counterclaim as follows:

FIRST AFFIRMATIVE DEFENSE

The Complaint fails to state a claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

This Court does not have proper jurisdiction or venue over this matter.

1. Defendant is currently without information sufficient to admit or deny the averments contained in paragraph 1 of the Complaint.

2. Admitted.

JURISDICTION

3. Denied. Jurisdiction in this action is proper in the United States District Court for the Southern District of Mississippi, Jackson Division.

4. Denied. 9 U.S.C. § 9 is permissive and not mandatory, and jurisdiction and venue are proper in the United States District Court for the Southern District of Mississippi, Jackson Division, where a Complaint to Vacate and/or Modify Arbitration Award was pending at the time this action was filed.

FACTS AND PROCEDURAL BACKGROUND

5. Admitted.

6. Admitted.

7. Defendant denies that Harbert ever "completed the project." It is admitted that the parties discussed certain excess expenditures, labor, and overhead Harbert alleged to have incurred in constructing the chip mill facility at issue. Any and all remaining allegations of paragraph 7 are denied.

8. It is admitted Harbert filed a demand for arbitration of the dispute. Any and all remaining allegations of paragraph one are denied.

9. Admitted.

10. Defendant denies that the arbitration panel made an award in favor of Harbert on December 10, 1997. Rather, the award was not rendered and forwarded to the parties until on or about December 20, 1997. It is admitted the arbitration panel entered an award adjusting the base contract amount owed Harbert upward from $1,357,000.00 to $1,845,500.00. The remaining allegations of paragraph 10 are admitted.

11. Admitted.

12. Admitted.

13. Defendant specifically denies any and all allegations contained in the paragraph beginning with the words "WHEREFORE, Harbert requests . . . ." Byrd specifically denies any liability for any damages whatsoever in this matter and denies the validity of the arbitration panel's award.

And now, the Defendant having fully answered the allegations in the Complaint, and without waiving any denials of the allegations of the Complaint or defenses thereto, asserts counterclaim as follows:

COUNTERCLAIM

1. Cortez Byrd Chips, Inc., is a duly licensed Mississippi corporation doing business in the State of Mississippi with its principal office located in the State of Mississippi, P.O. Box 547, Brookhaven, Mississippi 39601. Byrd is the owner of a chip mill facility located in Brookhaven, Mississippi, the construction and erection of which was the subject of the underlying arbitration proceeding at issue in this action.

2. Harbert is a division of Bill Harbert International, Inc., a corporation duly licensed and doing business in the State of Alabama with its principal offices located in the State of Alabama. Harbert contracted with Byrd to erect and build Byrd's chip mill facility located in Brookhaven, Mississippi, and is the party that instituted the underlying arbitration which is the subject of this Complaint. Harbert, at the time of bidding on this project and entering into the Agreement with Byrd, although not disclosed to or known by Byrd at that time, was not a duly licensed contractor in the State of Mississippi and did not hold a valid Certificate of Responsibility in Mississippi or similar certificate issued by another state recognizing such certificate issued by the State of Mississippi pursuant to the mandate found *Miss.Code Ann.* § 31-3-21 (Supp. 1997). Thus Harbert was precluded from invoking the null and void arbitration clause of the Agreement.

FACTS

3. The parties entered into an Abbreviated Form of Agreement Between Owner and Contractor (the "Agreement" or "Contract") with the effective date commencing October 16, 1995, a copy of which Agreement is attached hereto as Exhibit "A" and incorporated herein by reference. Paragraph 10.8 of the Agreement provided for arbitration of "[a]ll claims or disputes between the contractor and the owner arising out or relating to the contract, or the breach thereof . . . ."

4. A dispute arose between Harbert and Byrd relating to Harbert's construction of Byrd's chip mill facility located in Brookhaven, Mississippi. On April 30, 1997, Harbert made a demand for arbitration requesting a hearing and an award of damages from Byrd for certain construction costs and overages allegedly incurred during the erection of the chip mill facility. Byrd denied any obligation to pay any amount whatsoever over and above the original contract price of $1,357,000.00.

5. Pursuant to the arbitration clause contained in paragraph 10.8 of the Agreement, the following arbitrators were chosen by the parties to conduct the arbitration herein:

a. James R. Seale, Esquire
Robinson & Belzer
200 Coosa Street
Montgomery, Alabama 36102

b. Mr. David C. Dando
51 Wheelless Street
Suite 200
Memphis, Tennessee 38117

c. Mr. Charles Scallorn
100 Congress Avenue
Suite 1800
Austin, Texas 78701

On November 18-21, 1997, the arbitrators conducted a hearing and witnesses were called and evidence was presented by the parties.

6. Byrd claimed before the arbitration panel, and still claims, that Harbert proceeded at its own peril when it allegedly incurred certain costs which plainly required a written change order to be executed and approved by the parties in accordance with the Agreement. There was not one single change order written and executed by the parties in this case in accordance with the Agreement. This fact was admitted by counsel for Harbert at the commencement of the arbitration proceeding on November 18, 1997. No evidence of a change order as contemplated by the Agreement was placed in evidence for the arbitrators' consideration.

7. On December 20, 1997, the arbitrators rendered their award in writing and transmitted it to the parties via facsimile, a copy of which is attached hereto as Exhibit "B" and incorporated herein by reference.

8. The award of the arbitrators is based upon "Change Order Number One" resulting in an "adjusted contract amount of $1,845,500.00," with all amounts previously paid by Byrd to be offset against that amount. Thus, the arbitrators concluded that Byrd was obligated to pay the sum of $488,500.00, less all amounts previously paid by Byrd, which amount is the arbitrators' total calculation of Change Order Number One, and is the difference between the original contract sum agreed to by the parties, $1,357,000.00 and the "adjusted contract amount," $1,845,500.00. Although he was not obligated to do so under the terms of the Agreement, Byrd paid Harbert an amount exceeding $200,000.00 over the contract price. This amount is offset against the $488,500.00 adjustment.

9. The arbitrators required the balance due to be paid to Harbert, less any previous payments made by Byrd, within sixty (60) days from the award transmittal date, or from December

20, 1997. Any and all other claims made by Harbert in the demand for arbitration or presented to the panel of arbitrators were denied.

10. The arbitrators based their award on issues not placed before them by the parties, and thereby exceeded their authority and failed to conform to the specific contractual limitations placed upon their authority by the Agreement.

11. In issuing their award, the arbitrators made irrational findings and refused to apply facts as they found them to the issues characterized by the parties.

12. Despite absolutely no evidence of a written change order processed and executed in accordance with the terms of the Agreement, the arbitrators found that "Change Order Number One" required an adjustment of the contract sum in the amount of $488,500.00, to be offset by payments previously made by Byrd.

13. In providing the stated relief, the arbitrators' ultimate conclusions and the resulting award are illogical, contrary to express findings pertaining to the parties' intent, an exhibition of bad faith, impermissible modification of the Agreement, in manifest disregard of established facts and controlling law, and constitutes the arbitrators' own private brand of justice.

14. The arbitrators' award clearly does not draw its essence from the contract between the parties; but rather, the arbitrators in rendering the award at issue disregarded and/or modified plain and unambiguous provisions of the Agreement. The award rendered by the arbitration panel is of grievously flawed character and should be vacated by this Court. The record before the arbitration panel demonstrates unambiguous and undisputed mistake of fact and demonstrates strong reliance on that mistake of fact by the arbitration panel in making their award.

15. For all reasons stated herein, as well as for other good and valid reasons, the arbitrators' decision in the case with regard to their alleged remedy and their interpretation of the Agreement should be vacated and/or modified.

WHEREFORE, Plaintiff moves this Court for an Order vacating the portion of the arbitration award pertaining to the payment of damages and all supporting analysis on the grounds that the award is (1) in violation of the Agreement, (2) in excess of the arbitrators' authority, (3) irrational, (4) the result of bad faith, (5) arbitrary and capricious, (6) fails to draw its essence from the terms of the Agreement, and (7) is in manifest disregard of the established facts and law.

Respectfully submitted,

CORTEZ BYRD CHIPS, INC.

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210 East Capitol Street
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BY: /s/ John F. Hawkins
JOHN F. HAWKINS

Exhibit A

THE AMERICAN INSTITUTE OF ARCHITECTS

[Seal]

AIA Document A107

ABBREVIATED FORM OF AGREEMENT BETWEEN OWNER AND CONTRACTOR
For CONSTRUCTION PROJECTS OF LIMITED SCOPE where the Basis of Payment is a STIPULATED SUM

1987 EDITION

(Exhibit A printed in full at pages 41 to 61 of this Joint Appendix)

Exhibit B

AMERICAN ARBITRATION ASSOCIATION
ARBITRATION TRIBUNAL

In the Matter of the Arbitration Between:

Bill Harbert Construction Company, a division of Bill Harbert International, Inc. ("Harbert")
and
Cortez Byrd Chips, Inc. ("Byrd")

CASE NUMBER: 30 110 00164 97

AWARD OF ARBITRATORS
December 19, 1999

(Exhibit B printed in full at pages 62 to 63 of this Joint Appendix)

[Filed Feb. 27, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BILL HARBERT CONSTRUCTION COMPANY,
a division of Bill Harbert
International, Inc.

PLAINTIFF

V.

CORTEZ BYRD CHIPS, INC. **DEFENDANT**

ACTION NO. 98G117S

MOTION TO DISMISS, TRANSFER OR STAY

COMES NOW the Defendant, Cortez Byrd Chips, Inc. ("Byrd"), and submits this its Motion to Dismiss, Transfer or Stay this Action Pending Resolution by the District Court for the Southern District of Mississippi of Byrd's Complaint to Vacate and/or Modify Arbitration Award, and in support thereof, states as follows:

1. On January 13, 1998, Byrd filed a Complaint in the District Court for the Southern District of Mississippi, Jackson Division, to Vacate and/or Modify an Arbitration Award against Bill Harbert Construction Company, a division of Bill Harbert International, Inc. ("Harbert"). Thereafter, on January 20, 1998, Harbert filed in this Court its Complaint to Enforce Arbitration Award. Those two actions are attached hereto as Exhibits "A" and "B" respectively and incorporated herein by reference.

2. Byrd is entitled to have this action dismissed, transferred or stayed based on the "first to file rule". *Sutter Corp. v. P & P Industries, Inc.*, 125 F.3d 914 (5th Cir. 1997). Where, as here, the Mississippi and Alabama actions "overlap

on the substantive issues, the cases [should] be . . . consolidated in . . . the jurisdiction first seized of the issues." *Id.* at 917, quoting *Mann Mfg., Inc. v. Cortex, Inc.*, 439 F.2d 403, 408 n.6 (5th Cir. 1971). Mississippi is the "jurisdiction first seized of the issues," as Byrd filed its Complaint in the District Court for the Southern District of Mississippi, Jackson Division, prior to Harbert filing its Complaint on overlapping, identical substantive issues in the District Court for the Northern District of Alabama, Southern Division.

3. Jurisdiction and venue are proper in the District Court for the Southern District of Mississippi to determine the issues raised in Byrd's Complaint to Vacate and/or Modify the Arbitration Award pursuant to 9 U. S. C. §§ 10 and 11. The venue provisions of 9 U.S.C. §§ 10 and 11 are permissive. 9 U.S.C § 10 provides that "the United States Court in and for the district wherein the award was made may make an Order vacating the award upon the application of any party to the arbitration. . . ." In the *Sutter Corp.* case, the court recognized as follows:

> However, if venue under § 10 is mandatory, then the Texas district court would be the exclusive forum to decide P & P's motion to vacate the arbitration award, which would make a dismissal, transfer or stay impossible. Those circuits which have dealt with the question, uniformly agree that §§ 9 and 10 must be construed the same, regardless of whether they are found to be permissive or mandatory. *In re VMS Securities Litigation*, 21 F.3d at 142, *citing Sunshine Beauty Supplies, Inc. v. United States District Court for Central Dist. of Cal.*, 872 F.2d 310, 312 n.4 (9th Cir. 1989), *and Motion Picture Lab. Technicians Local 780 v. McGregor & Werner, Inc.*, 804 F.2d 16, 19 (2d Cir. 1986). In any event, a mandatory reading of § 10 would create the same absurd result decried in *Purdy*. We agree with the Seventh Circuit's reasoning in *In re VMS Securities Litigation*, 21 F.3d at 142-45, and hold that venue under § 10 is also permissive.

> Thus, § 10 did not prevent the Texas district court from dismissing, staying or transferring P & P's motion to vacate under the "first to file rule".

4. The venue provisions of 9 U.S.C. §§ 9, 10 and 11 are permissive, and not mandatory. Thus, the "first to file rule" determines which court may decide the merits of substantially similar cases, as well as the issue of which court may decide whether the second suit filed (Harbert's Alabama Complaint) must be dismissed, stayed or transferred and consolidated. *Sutter Corp.* at 920.

5. Byrd filed its Complaint in the Southern District of Mississippi, Jackson Division prior to Harbert filing its Complaint in the District Court for the Northern District of Alabama. Further, the issues raised in Byrd's suit to vacate and/or modify the arbitration award and the issues raised in Harbert's Alabama lawsuit seeking confirmation of the arbitration award are identical. Therefore, based on the "first to file rule," the District Court for the Southern District of Mississippi, Jackson Division, is the proper court to exercise its discretion determining whether the Harbert action filed in Alabama should be dismissed, transferred or stayed pending resolution of Byrd's Complaint and Motion to Vacate and/or Modify lodged in the District Court for the Southern District of Mississippi.

WHEREFORE, Defendant Cortez Byrd Chips, Inc. respectfully submits this case should be dismissed, transferred or stayed pending disposition by the District Court for the Southern District of Mississippi resolving whether the Alabama action should be allowed to proceed independently or should be dismissed, transferred, stayed and/or consolidated with the Mississippi action.

Respectfully submitted,

CORTEZ BYRD CHIPS, INC.
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By: /s/ John F. Hawkins
JOHN F. HAWKINS

Exhibit A
[Filed Jan. 13, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CORTEZ BYRD CHIPS, INC.,	)	
Plaintiff,	)	
	)	**Civ. Action**
v.	)	**No. 3198CV43BN**
	)	
BILL HARBERT CONSTRUCTION	)	
COMPANY, a division of Bill Harbert	)	
International, Inc.,	)	
Defendant.	)	

COMPLAINT

COMES NOW, Cortez Byrd Chips, Inc. ("Byrd") and files this his Complaint against Bill Harbert Construction Company, a division of Bill Harbert International, Inc. ("Harbert") by and through undersigned counsel, to vacate and/or modify an arbitration award rendered by a panel of arbitrators of the American Arbitration Association ("AAA") in favor of Herbert, and in support thereof states as follows:

PARTIES

1. Cortez Byrd Chips, Inc., is a duly licensed Mississippi corporation doing business in the State of Mississippi with its principal office located in the State of Mississippi, P.O. Box 547, Brookhaven, Mississippi, 39601. Byrd is the owner of a chip mill facility located in Brookhaven, Mississippi, the construction and erection of which was the subject of the underlying arbitration proceeding at issue in this Complaint.

2. Harbert is a corporation duly licensed and doing business in the State of Alabama with its principal offices located in the State of Alabama. Harbert contracted with Byrd to erect and build Byrd's chip mill facility located in Brookhaven, Mississippi, and is the party that instituted the underlying arbitration which is the subject of this Complaint. Harbert, at the time of bidding on this project and entering into the Agreement with Byrd, although not disclosed to or known by Byrd at that time, was not a duly licensed contractor in the State of Mississippi and did not hold a valid Certificate of Responsibility in Mississippi or similar certificate issued by another state recognizing such certificate issued by the State of Mississippi pursuant to the mandate found in *Miss. Code Ann.* § 31-3-21 (Supp. 1997). Thus Harbert was precluded from invoking the null and void arbitration clause of the Agreement.

JURISDICTION AND VENUE

3. Jurisdiction and venue are proper in this Court under 9 U.S.C. §§ 10 and 11. Additionally, jurisdiction is proper in this Court based on diversity of citizenship of the parties with the amount in controversy exceeding $75,000.00. The contract between these parties provided that the job was to be performed in Brookhaven, Mississippi, and all work by defendant on this job was performed at that site. The contract also provided that Mississippi law would apply and that according to the applicable arbitration rules any arbitration hearing would be held at the location of the job.

FACTS

4. The parties entered into an Abbreviated Form of Agreement Between Owner and Contractor (the "Agreement" or "Contract") with the effective date commencing October 16, 1995, a copy of which Agreement is attached hereto as Exhibit "A" and incorporated herein by reference. Paragraph 10.8 of the Agreement provided for arbitration of "[a]ll claims or

disputes between the contractor and the owner arising out or relating to the contract, or the breach thereof . . . ."

5. A dispute arose between Harbert and Byrd relating to Harbert's construction of Byrd's chip mill facility located in Brookhaven, Mississippi. On April 30, 1997, Harbert made a demand for arbitration requesting a hearing and an award of damages from Byrd for certain construction costs and overages allegedly incurred during the erection of the chip mill facility. Byrd denied any obligation to pay any amount whatsoever over and above the original contract price of $1,357,000.00.

6. Pursuant to the arbitration clause contained in paragraph 10.8 of the Agreement, the following arbitrators were chosen by the parties to conduct the arbitration herein:

a. James R. Seale, Esquire
Robinson & Belzer
200 Coosa Street
Montgomery, Alabama 36102

b. Mr. David C. Dando
51 Wheelless Street
Suite 200
Memphis, Tennessee 38117

c. Mr. Charles Scallorn
100 Congress Avenue
Suite 1800
Austin, Texas 78701

On November 18-21, 1997, the arbitrators conducted a hearing and witnesses were called and evidence was presented by the parties.

7. Byrd claimed before the arbitration panel, and still claims, that Harbert proceeded at its own peril when it allegedly incurred certain costs which plainly required a written

change order to be executed and approved by the parties in accordance with the Agreement. There was not one single change order written and executed by the parties in this case in accordance with the Agreement. This fact was admitted by counsel for Harbert at the commencement of the arbitration proceeding on November 18, 1997. No evidence of a change order as contemplated by the Agreement was placed in evidence for the arbitrators' consideration.

8. On December 20, 1997, the arbitrators rendered their award in writing and transmitted it to the parties via facsimile, a copy of which is attached hereto as Exhibit "B" incorporated herein by reference.

9. The award of the arbitrators is based upon "Change Order Number One" resulting in an "adjusted contract amount of $1,845,500.00," with all amounts previously paid by Byrd to be offset against that amount. Thus, the arbitrators concluded that Byrd was obligated to pay the sum of $488,500.00, less all amounts previously paid by Byrd, which amount is the arbitrators' total calculation of Change Order Number One, and is the difference between the original contract sum agreed to by the parties, $1,357,000.00 and the "adjusted contract amount," $1,845,500.00. Although he was not obligated to do so under terms of the Agreement, Byrd paid Harbert an amount exceeding $200,000.00 over the contract price. This amount is offset against the $488,500.00 adjustment.

10. The arbitrators required the balance due to be paid to Harbert, less any previous payments made by Byrd, within sixty (60) days from the award transmittal date, or from December 20, 1997. Any and all other claims made by Harbert in the demand for arbitration or presented to the panel of arbitrators were denied.

11. The arbitrators based their award on issues not placed before them by the parties, and thereby exceeded their authority

and failed to conform to the specific contractual limitations placed upon their authority by the Agreement.

12. In issuing their award, the arbitrators made irrational findings and refused to facts as they found them to the issues characterized by the parties.

13. Despite absolutely no evidence of a written change order processed and executed in accordance with the terms of the Agreement, the arbitrators found that "Change Order Number One" required an adjustment of the contract sum in the amount of $488,500.00, to be offset by payments previously made by Byrd.

14. In providing the stated relief, the arbitrators' ultimate conclusions and the resulting award are illogical, contrary to express findings pertaining to the parties' intent, an exhibition of bad faith, impermissible modification of the Agreement, in manifest disregard established facts and controlling law, and constitutes the arbitrators' own private brand of justice.

15. The arbitrators' award clearly does not draw its essence from the contract between the parties; but rather, the arbitrators in rendering the award at issue disregarded or modified plain and unambiguous provisions of the Agreement. The award rendered by the arbitration panel is of grievously flawed character and should be vacated by this Court. The record before the arbitration panel demonstrates unambiguous and undisputed mistake of fact and demonstrates strong reliance on that mistake of fact by the arbitration panel in making their award.

16. For all reasons stated herein, as well as for other good and valid reasons, the arbitrators' decision in the case with regard to their alleged remedy and their interpretation of the Agreement should be vacated and/or modified.

WHEREFORE, Plaintiff moves this Court for an Order vacating the portion of the arbitration award pertaining to the

payment of damages and all supporting analysis on the grounds that the award is (1) in violation of the Agreement, (2) in excess of the arbitrators' authority, (3) irrational, (4) the result of bad faith, (5) arbitrary and capricious, (6) fails to draw its essence from the terms of the Agreement, and (7) is in manifest disregard of the established facts and law.

Respectfully submitted,

CORTEZ BYRD CHIPS, INC.

John L. Maxey, II, MS Bar No. 1946
John F. Hawkins, MS Bar No. 9556
MAXEY, WANN & BEGLEY, PLLC
Suite 1900, Deposit Guaranty Plaza
210 East Capital Street
Post Office Box 3977
Jackson, Mississippi 39207-3977
(601) 355-8855

By: /s/ John L. Maxey
JOHN L. MAXEY

By: /s/ John F. Hawkins
JOHN F. HAWKINS

Exhibit B
[Filed Jan. 20, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BILL HARBERT CONSTRUCTION COMPANY, a division of Bill Harbert International, Inc.,	)	
Plaintiff,	)	
	)	**Civ. Action**
v.	)	**No. [98CV117]**
	)	
CORTEZ BYRD CHIPS, INC.,	)	
Defendant.	)	

COMPLAINT TO ENFORCE ARBITRATION AWARD

(Exhibit B printed in full at pages 4 to 6 of this Joint Appendix)

[Filed March 2, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BILL HARBERT CONSTRUCTION COMPANY, a division of Bill Harbert International, Inc.,	)	
Plaintiff,	)	
	)	**Civ. Action**
v.	)	**No. 98-G-0117-S**
	)	
CORTEZ BYRD CHIPS, INC.,	)	
Defendant.	)	

MOTION FOR LEAVE TO AMEND

Pursuant to Federal Rule of Civil Procedure 15(a), Plaintiff Bill Harbert Construction Co., a division of Bill Harbert International, Inc., moves the Court for leave to amend its complaint by substituting the following paragraph for paragraph 5 of the complaint:

> 5. On October 16, 1995, Harbert entered into a contract with Cortez Byrd to erect a prefabricated chip mill in Brookhaven, Mississippi.

As grounds for this motion, Plaintiff states as follows:

1. Justice requires that Plaintiff be allowed to amend its Complaint.

2. No discovery has been initiated or taken prior to the service of this motion.

3. No party will be prejudicated by the amendment.

/s/ Edward P. Meyerson
EDWARD P. MEYERSON, 114309504

/s/ Frederick M. Thurman
FREDERICK M. THURMAN, 256963110

[Entered March 2, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BILL HARBERT CONSTRUCTION COMPANY, a division of Bill Harbert International, Inc.,	)	
Plaintiff,	)	
	)	**Civ. Action**
v.	)	**No. 98-G-0117-S**
	)	
CORTEZ BYRD CHIPS, INC.,	)	
Defendant.	)	

[Handwritten Order at end of Motion for Leave to Amend (printed in full at pages 28 to 29 of this Joint Appendix): Granted 3/2/98 /s/ J. Foy Guin, Jr., Judge]

[Filed April 22, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BILL HARBERT CONSTRUCTION COMPANY, a division of Bill Harbert International, Inc.,	)	
Plaintiff,	)	
	)	**Civ. Action**
v.	)	**No. 98-G-0117-S**
	)	
CORTEZ BYRD CHIPS, INC.,	)	
Defendant.	)	

ANSWER TO COUNTERCLAIM

First Defense

Defendant's claim for *vacatur* or modification fails to state a claim upon which relief can be granted.

Second Defense

With respect to the specific numbered allegations of the Counterclaim, Plaintiff admits, denies, and otherwise responds as follows:

1. Plaintiff admits the allegations contained in paragraph 1 of the Counterclaim.

2. Plaintiff admits the allegations contained in the first and second sentences of paragraph 2 of the Counterclaim, and denies all of the remaining allegations contained therein.

3. Plaintiff admits the allegations contained in paragraph 3 of the Counterclaim.

4. Plaintiff admits the allegations contained in paragraph 4 of the Counterclaim.

5. Plaintiff admits the allegations contained in paragraph 5 of the Counterclaim.

6. Plaintiff denies the allegations contained in paragraph 6 of the Counterclaim.

7. Plaintiff admits the allegations contained in paragraph 7 of the Counterclaim.

8. Plaintiff denies that Defendant was not obligated under the terms of the Agreement to pay sums in excess of the contract price, and admits all of the other allegations contained in paragraph 8 of the Counterclaim.

9. Plaintiff admits the allegations contained in paragraph 9 of the Counterclaim.

10. Plaintiff denies the allegations contained in paragraph 10 of the Counterclaim.

11. Plaintiff denies the allegations contained in paragraph 11 of the Counterclaim.

12. Plaintiff admits that the arbitrators found that "Change Order Number One" required an adjustment of the contract sum in the amount of $488,500.00, to be offset by payments previously made by Defendant, and denies all of the other allegations contained in paragraph 12 of the Counterclaim.

13. Plaintiff denies the allegations contained in paragraph 13 of the Counterclaim.

14. Plaintiff denies the allegations contained in paragraph 14 of the Counterclaim.

15. Plaintiff admits the allegations contained in paragraph 15 of the Counterclaim.

Plaintiff denies that Defendant is entitled to any relief whatsoever and reasserts its position that the arbitration award is due to be confirmed.

/s/ Edward P. Meyerson
EDWARD P. MEYERSON, 114309504

/s/ Frederick M. Thurman
FREDERICK M. THURMAN, 256963110

Attorneys for Plaintiff

OF COUNSEL:

BERKOWITZ, LEFKOVITS,
ISOM & KUSHNER
A Professional Corporation
SouthTrust Tower, Suite 1600
420 North 20th Street
Birmingham, Alabama 35203-5202
(205) 328-0480

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BILL HARBERT CONSTRUCTION COMPANY, a division of Bill Harbert International, Inc.,	)
Plaintiff,	)
	) Civ. Action
v.	) No. 98-G-0117-S
	)
CORTEZ BYRD CHIPS, INC.,	)
Defendant.	)

April 24, 1998

MEMORANDUM OPINION

(Found in the Appendix to the Petition
for Certiorari at 8a-10a)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BILL HARBERT CONSTRUCTION COMPANY, a division of Bill Harbert International, Inc.,	)
Plaintiff,	)
	) Civ. Action
v.	) No. 98-G-0117-S
	)
CORTEZ BYRD CHIPS, INC.,	)
Defendant.	)

April 24, 1998

ORDER

(Found in the Appendix to the Petition
for Certiorari at 14a-15a)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BILL HARBERT CONSTRUCTION COMPANY, a division of Bill Harbert International, Inc.,	)	
Plaintiff,	)	
	)	Civ. Action
v.	)	No. 98-G-0117-S
	)	
CORTEZ BYRD CHIPS, INC.,	)	
Defendant.	)	

May 20, 1998

MEMORANDUM OPINION

(Found in the Appendix to the Petition
for Certiorari at 11a-13a)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BILL HARBERT CONSTRUCTION COMPANY, a division of Bill Harbert International, Inc.,	)	
Plaintiff,	)	
	)	Civ. Action
v.	)	No. 98-G-0117-S
	)	
CORTEZ BYRD CHIPS, INC.,	)	
Defendant.	)	

May 20, 1998

ORDER

(Found in the Appendix to the Petition
for Certiorari at 16a-17a)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BILL HARBERT CONSTRUCTION COMPANY, a division of Bill Harbert International, Inc.,	)	
Plaintiff,	)	
	)	Civ. Action
v.	)	No. 98-G-0117-S
	)	
CORTEZ BYRD CHIPS, INC.,	)	
Defendant.	)	

June 1, 1998

MEMORANDUM OPINION

(Found in the Appendix to the Petition
for Certiorari at 5a-7a)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BILL HARBERT CONSTRUCTION COMPANY, a division of Bill Harbert International, Inc.,	)	
Plaintiff,	)	
	)	Civ. Action
v.	)	No. 98-G-0117-S
	)	
CORTEZ BYRD CHIPS, INC.,	)	
Defendant.	)	

June 1, 1998

FINAL JUDGMENT

(Found in the Appendix to the Petition
for Certiorari at 18a)

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BILL HARBERT CONSTRUCTION COMPANY,
A DIVISION OF BILL HARBERT
INTERNATIONAL, INC.,
Plaintiff-Counter-Defendant, Appellee,

v.

CORTEZ BYRD CHIPS, INC., Defendant-
Counter-Claimant, Appellant.

No. 98-6404

Decided March 9, 1999

(Found in the Appendix to the Petition
for Certiorari at 1a-4a)

[Executed Oct. 16, 1995]
THE AMERICAN INSTITUTE OF ARCHITECTS

[Seal]

AIA Document A107

ABBREVIATED FORM OF AGREEMENT
BETWEEN OWNER AND CONTRACTOR
For CONSTRUCTION PROJECTS OF LIMITED
SCOPE where the Basis of Payment is a STIPULATED SUM

1987 EDITION

THIS DOCUMENT HAS IMPORTANT LEGAL
CONSEQUENCES; CONSULTATION WITH AN
ATTORNEY IS ENCOURAGED WITH RESPECT
TO ITS COMPLETION OR MODIFICATION

This document includes abbreviated General Conditions
and should not be used with other general conditions.
It has been approved and endorsed by The Associated
General Contractors of America

AGREEMENT

made as of the day of in the year of Nineteen Hundred and

BETWEEN the Owner:
(Name and address)
Cortez Byrd Chips, Inc.
P.O. Box 547
Brookhaven, Mississippi 39601

and the Contractor:
(Name and address)
Bill Harbert Construction, Inc.
1329 Forestdale Boulevard
Birmingham, Alabama 35214
The Project is:
(Name and location)
Cortez Byrd Wood Chipper
(Quality Machine &Fab Works Job #002)

The [illegible] *Designer* is:
(Name and address)
Quality Machine & Fab Works
Trussville, Alabama.

The Owner and Contractor agree as set forth below.

ARTICLE 1
THE WORK OF THIS CONTRACT

1.1 The Contractor shall execute the entire Work described in the Contract Documents, except to the extent specifically indicated in the Contract documents to be the responsibility of others, or as follows:

Provide labor and materials (concrete and rebar included) to install concrete foundation on prepared site as shown on drawings prepared by Quality Machine. (Site Grading will be by others)

Provide labor and construction equipment to erect structural steel and install process equipment as shown on drawings prepared by Quality Machine.

Provide labor and materials to electrically connect all motors and controls. Main power will be installed within 50' of chipper, by others.

ARTICLE 2
DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION

2.1 The date of commencement is the date from which the Contract time of Paragraph 2.2. is measured, and shall be the date of this Agreement, as first written above, unless a different date is stated below or provision is made for the date to be fixed in a notice to proceed issued by the Owner. . . .

October 16, 1995

2.2 The Contractor shall achieve Substantial Completion of the entire Work not later than . . . *30 weeks from said start date*.

2.3. Subject to adjustment of this Contract Time as provided in the Contract Documents. . . .

ARTICLE 3
CONTRACT SUM

3.1 The Owner shall pay the Contractor in current funds for the Contractor's performance of the Contract the Contract Sum of *One million three hundred fifty-seven thousand and .00 Dollars ($1,357,000.00)*, subject to addition as and deductions as provided in the Contract Document).

3.2 The Contract Sum is based upon the following alternatives, if any, which are described in the Contract Documents and are hereby accepted by the Owner: *N/A* . . . .

3.3 Unit prices, if any are as follows: *N/A*

ARTICLE 4
PROGRESS PAYMENTS

4.1 Based upon Applications for Payment submitted to the Architect by the Contractor and Certificates for Payment issued by the Architect, the Owner shall make progress payments on

account of the Contract Sum to the Contractor as provided below and elsewhere in the Contract Documents. The period covered by each Application for Payment shall be one calendar month ending on the last day of the month, or as follows:

4.2 Payments due and unpaid under the Contract shall bear interest from the date payment is due at the rate stated below, or in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located. . . .

ARTICLE 5
FINAL PAYMENT

5.1 Final payment, constituting the entire unpaid balance of the Contract Sum, shall be made by the Owner to the Contractor when the Work has been completed, the Contract fully performed, and a final Certificate for Payment has been issued by the Architect.

ARTICLE 6
ENUMERATION OF CONTRACT DOCUMENTS

6.1 The Contract Documents are listed in Article 7 and, except for Modifications issued after execution of this Agreement, are enumerated as follows:

6.1.1 The Agreement is this executed Abbreviated Form of Agreement Between Owner and Contractor, AIA Document A107, 1987 Edition.

6.1.2 The Supplementary and other Conditions of the Contract are those contained in the Project Manual dated ___ _____, and are as follows:

Document	Title	Pages

Drawings & Documents prepared by Quality Machine Fab Works. . . .

6.1.3 The Specifications are those contained in the Project Manual dated as in Subparagraph 6.1.2, and are as follows: . . .

Section	Title	Pages

Specifications by Quality Fab

6.1.4 The Drawings are as follows, and are dated _____ unless a different date is shown below: . . .

Number	Title	Pages

Drawings by Quality Fab

6.1.5 The Addenda, if any, are as follows:

Number	Title	Pages

Portions of Addenda relating to bidding requirements are not part of the Contract Documents unless the bidding requirements are also enumerated in this Article 6.

6.1.6 Other documents, if any, forming part of the Contract Documents are as follows: . . .

GENERAL CONDITIONS

ARTICLE 7
CONTRACT DOCUMENTS

7.1 The Contract documents consist of this Agreement with Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, addenda issued prior to the execution of this Agreement, other documents listed in this Agreement and Modifications issued after execution of this Agreement. The Intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work by the Contractor. The Contract Documents are complementary, and what is required by one shall be as binding as if required by all; performance by the Contractor shall be required only to the extent consistent with

the Contract Documents and reasonably inferable from them as being necessary to produce the intended results.

7.2 The Contract Documents shall not be construed to create a contractual relationship of any kind (1) between the Architect and Contractor, (2) between the Owner and a Subcontractor or Sub-subcontractor or (3) between any persons or entities other than the Owner and Contractor.

7.3 Execution of the Contract by the Contractor is a representation that the Contractor has visited the site and become familiar with the local conditions under which the Work is to be performed.

7.4 The term "Work" means the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the contractor's obligations. The Work may constitute the whole or a part of the Project.

ARTICLE 8
OWNER

8.1 The Owner shall furnish surveys and a legal description of the site.

8.2 Except for permits and fees which are the responsibility of the Contractor under the Contract Documents, the Owner shall secure and pay for necessary approvals, easements, assessments and charges required for the construction, use or occupancy of permanent structures or permanent changes in existing facilities.

8.3 If the Contractor fails to correct Work which is not in accordance with the requirements of the Contract Documents or persistently fails to carry out the Work in accordance with the Contract Documents, the Owner, by a written order, may order the Contractor to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, the

right of the Owner to stop the Work shall not give rise to a duty on the part of the Owner to exercise this right for the benefit of the Contractor or any other person or entity.

ARTICLE 9
CONTRACTOR

9.1 The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless Contract Documents give other specific instructions concerning these matters.

9.2 Unless otherwise provided in the Contract Documents, the Contractor shall provide and pay for labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for the proper execution and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work.

9.3 The Contractor shall enforce strict discipline and good order among the Contractor's employees and other persons carrying out the Contract. The Contractor shall not permit employment of unfit persons or persons not skilled in tasks assigned to them.

9.4 The Contractor warrants to the Owner and Architect that materials and equipment furnished under the Contract will be of good quality and new unless otherwise required or permitted by the Contract Documents, that the Work will be free from defects not inherent in the quality required or permitted, and that the Work will conform with the requirements of the Contract Documents. Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective. The Contractor's warranty excludes remedy for

damage or defect caused by abuse, modifications not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear under normal usage. If required by the Architect, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

9.5 Unless otherwise provided in the Contract Documents, the Contractor shall pay sales, consumer, use, and other similar taxes which are legally enacted when bids are received or negotiations concluded, whether or not yet effective or merely scheduled to go into effect, and shall secure and pay for the building permit and other permits and governmental fees, licenses and inspections necessary for proper execution and completion of the Work.

9.6 The Contraction shall comply with and give notices required by laws, ordinances, rules, regulations, and lawful orders of public authorities bearing on performance of the Work. The Contractor shall promptly notify the Architect and Owner if the Drawings and Specifications are observed by the Contractor to be at variance therewith.

9.7 The Contractor shall be responsible to the Owner for the acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons performing portions of the Work under a contract with the Contractor.

9.8 The Contractor shall review, approve and submit to the Architect Shop Drawings, Product Data, Samples and similar submittals required by the Contract Documents with reasonable promptness. The Work shall be in accordance with approved submittals. When professional certification of performance criteria of materials, systems or equipment is required by the Contract Documents, the Architect shall be entitled to rely upon the accuracy and completeness of such certifications.

9.9 The Contractor shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations under the Contract. At completion of the Work the Contractor shall remove from and about the Project waste materials, rubbish, the Contractor's tools, construction equipment, machinery and surplus materials.

9.10 The Contractor shall provide the Owner and Architect access in the Work in preparation and progress wherever located.

9.11 The Contractor shall pay all royalties and license fees, shall defend suits or claims for infringement of patent rights and shall hold the Owner harmless from loss on account thereof, but shall not be responsible for such defense or loss when a particular design, process or product of a particular manufacturer or manufacturers is required by the Contract Documents unless the Contractor has reason to believe that there is an infringement of patent.

9.12 To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including loss of use resulting therefrom, but only to the extent caused in whole or in part by negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 9.12.

9.12.1 In claims against any person or entity indemnified under this Paragraph 9.12 by an employee of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under this Paragraph 9.12 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Contractor or a Subcontractor under workers' or workmen's compensation acts, disability benefit acts or other employee benefit acts.

9.12.2 The obligations of the Contractor under this Paragraph 9.12 shall not extend to the liability of the Architect, the Architect's consultants, and agents and employees of any of them arising out of (1) the preparation or approval of maps, drawings, opinions, reports, surveys, Change Orders, Construction Change Directives, designs or specifications, or (2) the giving of or the failure to give directions or instructions by the Architect, the Architect's consultants, and agents and employees of any of them provided such giving or failure to give is the primary cause of the injury or damage.

ARTICLE 10
ADMINISTRATION OF THE CONTRACT

10.1 The Architect will provide administration of the Contract and will be the Owner's representative (1) during construction, (2) until final payment is due and (3) with the Owner's concurrence, from time to time during the correction period described in Paragraph 18.1.

10.2 The Architect will visit the site at intervals appropriate to the stage of construction to become generally familiar with the progress and quality of the completed Work and to determine in general if the Work is being performed in a manner indicating that the Work, when completed, will be in accordance with the Contract Documents. However, the Architect will not be required to make exhaustive or continuous on-site inspections to check quality or quantity of

the Work. On the basis of on-site observations as an architect, the Architect will keep the Owner informed of progress of the Work and will endeavor to guard the Owner against defects and deficiencies in the Work.

10.3 The Architect will not have control over or charge of and will not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, since these are solely the Contractor's responsibility as provided in paragraphs 9.1 and 16.1. The Architect will not be responsible for the Contractor's failure to carry out the Work in accordance with the Contract Documents.

10.4 Based on the Architect's observations and evaluations of the Contractor's Applications for Payment, the Architect will review and certify the amounts due the Contractor and will issue Certificates for Payment in such amounts.

10.5 The Architect will interpret and decide matters concerning performance under and requirements of the Contract Documents on written request of either the Owner or Contractor. The Architect will make initial decisions on all claims, disputes or other matters in question between the Owner and Contractor, but will not be liable for results of any interpretations or decisions rendered in good faith. The Architect's decisions in matters relating to aesthetic effect will be final if consistent with the intent expressed in the Contract Documents. All other decisions of the Architect, except those which have been waived by making or acceptance of final payment, shall be subject to arbitration upon the written demand of either party.

10.6 The Architect will have authority to reject Work which does not conform to the Contract Documents.

10.7 The Architect will review and approve or take other appropriate action upon the Contractor's submittals such as Shop Drawings, Product Data and Samples, but only for the

limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents.

10.8 All claims or disputes between the Contractor and the Owner arising out or relating to the Contract, or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect unless the parties mutually agree otherwise and subject to an initial presentation of the claim or dispute to the Architect as required under Paragraphs 10.5. Notice of the demand for arbitration shall be filed in writing with the other party to this Agreement and with the American Arbitration Association and shall be made within a reasonable time after the dispute has arisen. The award rendered by the arbitrator or arbitrators shall be final, and judgement may be entered upon it in accordance with applicable law in any court having jurisdiction thereof. Except by written consent of the person or entity sought to be joined, no arbitration arising out of or relating to the Contract Documents shall include, by consolidation, joinder or in any other manner, any person or entity not a party to the Agreement under which such arbitration arises, unless it is shown at the time the demand for arbitration is filed that (1) such person or entity is substantially involved in a common question of fact or law, (2) the presence of such person or entity is required if complete relief is to be accorded in the arbitration, (3) the interest or responsibility of such person or entity in the matter is not insubstantial, and (4) such person or entity is not the Architect or any of the Architect's employees or consultants. The agreement herein among the parties to the Agreement and any other written agreement to arbitrate referred to herein shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

ARTICLE 11
SUBCONTRACTS

11.1 A Subcontractor is a person or entity who has a direct contract with the Contractor to perform a portion of the Work at the site.

11.2 Unless otherwise stated in the Contract Documents or the bidding requirements, the Contractor, as soon a practicable after award of the Contract, shall furnish in writing to the Owner through the Architect the names of the Subcontractors for each of the principal portions of the Work. The Contractor shall not contract with any Subcontractor to whom the Owner or Architect has made reasonable and timely objection. The Contractor shall not be required to contract with anyone to whom the Contractor has made reasonable objection. Contracts between the Contractor and Subcontractors shall (1) require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by the terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities which the Contractor, by the Contract Documents, assumes toward the Owner and Architect, and (2) allow to the Subcontractor the benefit of all rights, remedies and redress afforded to the Contractor by these Contract Documents.

ARTICLE 12
CONSTRUCTION BY OWNER OR BY SEPARATE CONTRACTORS

12.1 The Owner reserves the right to perform construction or operations related to the Project with the Owner's own forces, and to award separate contracts in connection with other portions of the Project or other construction or operations on the site under conditions of the contract identical or substantially similar to these, including those portions related to Insurance and waiver of subrogation. If the Contractor claims that delay or additional cost is involved because of such

action by the Owner, the contractor shall make such claim as provided elsewhere in the Contract Documents.

12.2 The Contractor shall afford the Owner and separate contractors reasonable opportunity for the introduction and storage of their materials and equipment and performance of their activities, and shall connect and coordinate the Contractor's construction and operation with theirs as required by the Contract Documents.

12.3 Costs caused by delays, improperly timed activities or defective construction shall be borne by the party responsible therefor.

ARTICLE 13
CHANGES IN THE WORK

13.1 The Owner, without invalidating the Contract, may order changes in the Work consisting of additions, deletions or modifications, the Contract Sum and Contact Time being adjusted accordingly. Such changes in the Work shall be authorized by written Change Order signed by the Owner, Contractor and Architect, or by written Construction Change Directive signed by the Owner and Architect.

13.2 The Contract Sum and Contract Time shall be changed only by Change Order.

13.3 The cost or credit to the Owner from a change in the Work shall be determined by mutual agreement.

ARTICLE 14
TIME

14.1 Time limits stated in the Contract Documents are of the essence of the Contract. By executing the Agreement the Contractor confirms that the Contract Time is a reasonable period for performing the Work.

14.2 The date of Substantial Completion is the date certified by the Architect in accordance with Paragraph 15.3.

14.3 If the Contractor is delayed at any time in progress of the Work by changes order in the Work, by labor disputes, fire, unusual delay in deliveries, abnormal adverse weather conditions not reasonably anticipatable, unavoidable casualties or any causes beyond the Contractor's control, or by other causes which the Architect determines may justify delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.

ARTICLE 15
PAYMENTS AND COMPLETION

15.1 Payments shall be made as provided in Articles 4 and 5 of this Agreement.

15.2 Payments may be withheld on account of (1) defective Work not remedied, (2) claims filed by third parties, (3) failure of the Contractor to make payments properly to Subcontractors or for labor, materials or equipment, (4) reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Sum, (5) damage to the Owner or another contractor, (6) reasonable evidence that the Work will not be completed within the Contract Time and that the unpaid balance would not be adequate to cover actual or liquidated damages for the anticipated delay, or (7) persistent failure to carry out the Work in accordance with the Contract Documents.

15.3 When the Architect agrees that the Work is substantially complete, the Architect will issue a Certificate of Substantial Completion.

15.4 Final payment shall not become due until the Contractor has delivered to the Owner a complete release of all liens arising out of this Contract or receipts in full covering all labor, materials and equipment for which a lien could be filed, or a bond satisfactory to the Owner to indemnify the Owner against such lien. If such lien remains unsatisfied after payments are made, the Contractor shall refund to the Owner all money that

the Owner may be compelled to pay in discharging such lien, including all costs and reasonable attorney's fees.

15.5 The making of final payment shall constitute a waiver of claims by the Owner except those arising from:

.1 liens, claims, security interests or encumbrances arising out of the Contract and unsettled;

.2 failure of the Work to comply with the requirements of the Contract Documents; or

.3 terms of special warranties required by the Contract Documents.

Acceptance of final payment by the Contractor, a Subcontractor or material supplier shall constitute a waiver of claims by that payee except those previously made in writing and identified by that payee as unsettled at the time of final Application for Payment.

ARTICLE 16
PROTECTION OF PERSONS AND PROPERTY

16.1 The Contractor shall be responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the performance of the Contract. The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to:

.1 employees on the Work and other persons who may be affected thereby;

.2 the Work and materials and equipment to be incorporated therein; and

.3 other property at the site or adjacent thereto.

The Contractor shall give notices and comply with applicable laws, ordinances, rules, regulations and lawful orders of public authorities bearing on safety of persons and property and their

protection from damage, injury or loss. The Contractor shall promptly remedy damage and loss to property at the site caused in whole or in part by the Contractor, a Subcontractor, a Sub-subcontractor, or anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable and for which the Contractor is responsible under Subparagraphs 16.1.2 and 16.1.3, except for damage or loss attributable to acts or omissions of the Owner or Architect or by anyone for whose acts either of them may be liable, and not attributable to the fault or negligence of the Contractor. The foregoing obligations of the Contractor are in addition to the Contractor's obligations under Paragraph 9.12.

16.2 The Contractor shall not be required to perform without consent any Work relating to asbestos or polychlorinated biphenyl (PCB).

ARTICLE 17
INSURANCE

17.1 The Contractor shall purchase from and maintain in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located insurance for protection from claims under workers' or workmen's compensation acts and other employee benefit acts which are applicable, claims for damages because of bodily injury, including death, and from claims for damages, other than to the Work itself, to property which may arise out of or result from the Contractor's operations under the Contract, whether such operations be by the Contractor or by a Subcontractor or anyone directly or indirectly employed by any of them. This insurance shall be written for not less than limits of liability specified in the Contract Documents or required by law, whichever coverage is greater, and shall include contractual liability insurance applicable to the Contractor's obligations under Paragraph 9.12. Certificates or such insurance shall be filed with the Owner prior to the commencement of the Work.

17.2 The Owner shall be responsible for purchasing and maintaining the owner's usual liability insurance. Optionally, the Owner may purchase and maintain other insurance for self-protection against claims which may arise from operations under the Contract. The Contractor shall not be responsible for purchasing and maintaining this optional Owner's liability insurance unless specifically required by the Contract Documents.

17.3 Unless otherwise provided, the Owner shall purchase and maintain, in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located, property insurance upon the entire Work at the site to the full insurable value thereof. This insurance shall be on an all-risk policy form and shall include interests of the Owner, the Contractor, Subcontractors and the Sub-subcontractors in the Work and shall insure against the perils of fire and extended coverage and physical loss or damage including, with duplication of coverage, theft, vandalism and malicious mischief.

17.4 A loss insured under Owner's property insurance shall be adjusted with the Owner and made payable to the Owner as fiduciary for the insureds, as their interests may appear, subject to the requirements of any applicable mortgagee clause.

17.5 The Owner shall file a copy of each policy with the Contractor before an exposure to loss may occur. Each policy shall contain a provision that the policy will not be cancelled or allowed to expire until at least 30 days' prior written notice has been given to the Contractor.

17.6 The Owner and Contractor waive all rights against each other and the Architect, Architect's consultants, separate contractors described in Article 12, if any, and any of their subcontractors, sub-subcontractors, agents and employees, for damages caused by fire or other perils to the extent covered by property insurance obtained pursuant to this Article 17 or any

other property insurance applicable to the Work, except such rights as they may have to the proceeds of such insurance held by the Owner as fiduciary. The Contractor shall require similar waivers in favor of the Owner and the Contractor by Subcontractors and Sub-subcontractors. The Owner shall require similar waivers in favor of the Owner and Contractor by the Architect, Architect's consultants, separate contractors described in Article 12, if any, and the subcontractors, sub-subcontractors, agents and employees of any of them.

ARTICLE 18
CORRECTION OF WORK

18.1 The Contractor shall promptly correct Work rejected by the Architect or failing to conform to the requirements of the Contract Documents, whether observed before or after Substantial Completion and whether or not fabricated, installed or completed, and shall correct any Work found to be not in accordance with the requirements of the Contract Documents within a period of one year from the date of Substantial Completion of the Contract or by terms of an applicable special warranty required by the Contract Documents. The provisions of this Article 18 apply to Work done by Subcontractors as well as to Work done by direct employees of the Contractor.

18.2 Nothing contained in this Article 18 shall be construed to establish a period of limitation with respect to other obligations which the Contractor might have under the Contract Documents. Establishment of the time period of one year as described in Paragraph 18.1 relates only to the specific obligations of the Contractor to correct the Work, and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Contractor's liability with respect to the Contractor's obligations other than specifically to correct the Work.

ARTICLE 19
MISCELLANEOUS PROVISIONS

19.1 The Contract shall be governed by the law of the place where the Project is located.

19.2 As between the Owner and the Contractor, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued:

.1 not later than the date of Substantial Completion for acts or failures to act occurring prior to the relevant date of Substantial Completion;

.2 not later than the date of issuance of the final Certificate for Payment for acts or failures to act occurring subsequent to the relevant date of Substantial Completion and prior to issuance of the final Certificate for Payment; and

.3 not later than the date of the relevant act or failure to act by the Contractor for acts or failures to act occurring after the date of the final Certificate for Payment.

ARTICLE 20
TERMINATION OF THE CONTRACT

20.1 If the Architect fails to recommend payment for a period of 30 days through no fault of the Contractor, or if the Owner fails to make payment thereon for a period of 30 days, the contractor may, upon seven additional days' written notice to the Owner and the Architect, terminate the contract and recover from the Owner payment for all Work executed and for proven loss with respect to materials, equipment, tools, and construction equipment and machinery, including reasonable overhead, profit and damages applicable to the Project.

20.2 If the Contractor defaults or persistently fails or neglects to carry out the Work in accordance with the Contract

Documents or fails to perform a provision of the Contract, the Owner, after seven days' written notice to the Contractor and without prejudice to any other remedy the Owner may have, may make good such deficiencies and may deduct the cost thereof, including compensation for the Architect's services and expenses made necessary thereby, from the payment then or thereafter due the Contractor. Alternatively, at the Owner's option, and upon certification by the Architect that sufficient cause exists to justify such action, the Owner may terminate the contract and take possession of the site and of all materials, equipment, tools, and construction equipment and machinery thereon owned by the Contractor and may finish the Work by whatever method the Owner may deem expedient. If the unpaid balance of the Contract Sum exceeds costs of finishing the Work, including compensation for the Architect's services and expenses made necessary thereby, such excess shall be paid to the Contractor, but if such costs exceed such unpaid balance, the Contractor shall pay the difference to the Owner.

ARTICLE 21
OTHER CONDITIONS OR PROVISIONS

This Agreement entered into as of the day and year first written above.

OWNER	CONTRACTOR
_____	/s/ illegible
(Signature)	(Signature)
_____	_____
(Print name and title)	(Print name and title)

AMERICAN ARBITRATION ASSOCIATION
ARBITRATION TRIBUNAL

In the Matter of the Arbitration Between:

Bill Harbert Construction Company, a division of Bill Harbert International, Inc. ("Harbert")
and
Cortez Byrd Chips, Inc. ("Byrd")

CASE NUMBER: 30 110 00164 97

AWARD OF ARBITRATORS

We, the undersigned Arbitrators, having been designated in accordance with the arbitration agreement entered into by the above-named parties and dated October 16, 1995 and having been duly sworn and having duly heard the proofs and allegations of the parties, AWARD as follows:

Bill Harbert Construction Company ("Harbert") shall have a final adjusted contract amount of $1,845,500.00, which includes Change Order Number One calculated as follows:

Concrete	836 cy @ $175	$146,300.00
Motor Replacement		25,000.00
Structural Backcharges & Added Weight		100,000.00
Electrical Work		29,700.00
Structural Materials		27,000.00
Extended Overhead	8 weeks @ $9,000	72,000.00
Painting		29,000.00
Subtotal		$429,000.00
Overhead & Profit @ 10%		42,900.00
Subtotal		$471,900.00
Gross Receipts Tax @ 3.5%		16,600.00
Total Change Order No. 1		$488,500.00

All amounts previously paid by Cortez Byrd Chips, Inc. ("Byrd") are to be offset against the adjusted contract amount of $1,845,500.00.

The balance due Harbert after deduction of all previous payments is due and payable within sixty (60) days from the award transmittal date. If the balance due Harbert is not paid within sixty (60) days from the award transmittal date, interest at the rate of ten percent (10%) per annum will be applied to the balance due until paid. All other claims of Harbert are denied.

The compensation of the arbitrators totaling Fourteen Thousand Eight Hundred Forty-seven Dollars and 94/100 ($14,847.94) shall be borne by both parties.

The administrative fees and expenses of the American Arbitration Association totaling Six Thousand Eight Hundred Twenty-eight Dollars and No/100 ($6,828.00) shall be borne equally by both parties. Therefore, Byrd shall pay to Harbert the sum of Two Thousand Five Hundred Dollars and No/100 ($2,500.00) for that portion of it share of administrative fees and expenses previously advanced by Harbert to the Association.

December 10, 1997 — /s/ James R. Seale
James R. Seale

December 19, 1997 — /s/ Charles Scallorn
Charles Scallorn

December 12, 1997 — /s/ David C. Dando
David C. Dando

**IN THE SUPREME COURT
OF THE UNITED STATES**

[Caption Omitted in Printing]

Order Granting Petition for a Writ of Certiorari entered on September 10, 1999.